WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION

Law Enforcement Digest

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HONOR ROLL

520th Session, Basic Law Enforcement Academy, 106th Session, Spokane Police Academy
August 7th through December 13, 2000

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

STATUTE ON SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION SURVIVES ANOTHER CONSTITUTIONAL CHALLENGE AND DUE PROCESS, LIBERTY AND PRIVACY -- In Personal Restraint Petition of Douglas Earl Meyer, ___ Wn.2d ___ (2001) [2001 WL 9067], the Washington Supreme Court rules, 6-3, that Washington's sex offender registration and notification laws do not violate constitutional liberty and privacy rights of sex offenders, even though those laws do not provide for a hearing prior to the government's determination of an offender's classification.

RCW 4.24.550 and 9A.44.130 require that sex offenders register with their local sheriff. RCW 4.24.550 also permits local law enforcement agencies to, upon the release of sex offenders from confinement, notify the public. The scope of notification permitted under the statutes is based on the risk classification of the offender. Risk classification is initially done by the Department of Corrections (DOC), but local law enforcement agencies make the final determination of risk classification. The statutory scheme makes no provision for notice to or hearing for the offender prior to classification and notice to the public.

In 1994, certain constitutional challenges to this statutory scheme were rejected by the Washington Supreme Court in State v. Ward, 123 Wn.2d 488 (1994). Three years later, the Ninth Circuit of the U.S. Court of Appeals rejected another constitutional challenge to the statutes. Russell v. Gregoire, 124 F.3d 1079 (1997). Now, in a majority opinion authored by Justice Talmadge, the Washington Supreme Court has rejected another constitutional challenge in a decision that will make it difficult for offenders to bring another challenge to the statute based on liberty or privacy rights. The majority opinion in Meyer does note, however, that:

> [S]uch offenders are not without avenues of relief if the [DOC] classification recommendation or the local law enforcement agency decision is arbitrary or capricious. These individuals may secure judicial review by writ of certiorari for arbitrary and capricious classification.

Justices Alexander, Johnson and Sanders dissent in the Meyer case, arguing in vain that, by not providing for a pre-classification hearing, the statutory scheme violates an offender's right to privacy, or, more specifically, the right not to be wrongfully stigmatized and labeled as dangerous.

Result: Affirmance of lower court decisions adverse to sex offenders, Douglas Earl Meyer, Eric L. Erickson, and Bradley T. Sundstrom.

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WASHINGTON STATE COURT OF APPEALS

ALTHOUGH DRIVER OF STOPPED VEHICLE WAS NERVOUS, EVASIVE, AND KNOWN TO BE A COCAINE DEALER, OFFICER'S "OPEN VIEW" OF SUSPICIOUS WHITE POWDER ON DRIVER'S PANTS LEG HELD TO NOT JUSTIFY ENTRY OF VEHICLE TO SEIZE AND TEST THE POWDER

State v. Lemus, 103 Wn. App. 94 (Div. III, 2000)

Facts and Proceedings Below: (Excerpted from Court of Appeals opinion)

Officer [1] saw Mr. Lemus make what the officer believed to be an improper lane change on a city street in Othello. Officer [1] stopped Mr. Lemus's vehicle and asked for back-up, a standard procedure for nighttime traffic stops. Mr. Lemus told Officer [1] he did not have insurance. Officer [1] decided not to charge the improper lane change, but returned to his patrol car to prepare a Notice of Infraction (NOI) for no insurance.

Officer [2] arrived as back up. Officer [1] advised Officer [2] that Mr. Lemus was a known drug trafficker based upon prior contacts with the Othello Police Department. Officer [1] approached Mr. Lemus again from the driver's side of the car while Officer [2] approached from the passenger side. To ensure officer safety, Officer [2] illuminated the passenger compartment of the vehicle with his flashlight. Officer [2] particularly focused his attention on Mr. Lemus's hands. Officer [1] noticed Mr. Lemus appeared nervous, which the officer felt was inconsistent with his prior encounters with Mr. Lemus.

Officer [2] observed that Mr. Lemus kept his right hand motionless on his pant leg. Officer [2] noticed that when Mr. Lemus moved his right hand to accept a pen from Officer [1] to sign the NOI, there was a white powdery substance on Mr. Lemus's pant leg that had been previously concealed from view by Mr. Lemus's right hand and arm. Officer [2] immediately concluded the powder was "very possibly" cocaine. Officer [2] told Officer [1] about the powdery substance. Officer [1] asked Mr. Lemus what the substance was and told him not to move his hands. Mr. Lemus responded by brushing the substance off his pant leg. Officer [1] testified that based upon his training, the powder "resembled" cocaine.

When Officer [1] returned to Mr. Lemus's car with the infraction notice he detected the odor of intoxicants on Mr. Lemus's breath that he had not initially noticed due to the smell of cigarette smoke. After learning of the powdery substance, Officer [1] asked Mr. Lemus to exit the vehicle to perform field sobriety tests (FSTs).

During the FSTs, passed successfully by Mr. Lemus, Officer [3] arrived with the field testing kit and without a warrant removed a sample of the white powdery substance from Mr. Lemus's vehicle. It field-tested positive for cocaine. Officer [1] then arrested Mr. Lemus. Also during the FSTs, Officer [1] noticed a bulge in Mr. Lemus's left front pants pocket. Officer [1] then conducted a pat-down search. During the search, Officer [1] felt a pointed object, which he thought might be a weapon. The object turned out to be a small scale of the type used by drug dealers, but there was no evidence the scale had been used. Later, at the station during a strip-search, approximately 13.7 grams of cocaine was discovered in Mr. Lemus's underwear.

Mr. Lemus's CrR 3.6 motion to suppress the evidence seized from the car and Mr. Lemus's person was denied. Mr. Lemus was found guilty of possessing cocaine at a stipulated bench trial based upon the CrR 3.6 hearing findings. He was given a standard range sentence.

[Officers' names omitted]

ISSUES AND RULINGS: (1) Was Officer [1] justified in making the initial traffic stop for an improper lane change? (ANSWER: Yes); (2) Were the officers justified in extending the duration of the traffic stop and in requesting that Lemus step out of his vehicle? (ANSWER: Yes, because the officers had a reasonable suspicion that Lemus had committed an alcohol-related offense or other offense in addition to the lane change violation); (3) Does the open view of white powder on the pants leg of a known cocaine dealer justify entry of his car to seize and test the powder? (ANSWER: No, because the interior of a car is entitled to privacy protection); (4) Can the entry of the car and the seizure and testing of the powder be justified as a search incident to a lawful arrest? (ANSWER: No, because

the officers did not have probable cause to make a custodial arrest of Lemus until after they field-tested the powder)

Result: Reversal of Adams County Superior Court conviction for possession of cocaine.

ANALYSIS:

(1) Stop for unlawful lane change

The Lemus Court explains as follows that the officer was justified in making the stop of Lemus for the improper lane change:

> Officer [1] testified on direct that Mr. Lemus changed lanes before he signaled. On cross, Officer [1] agreed that his written report described Mr. Lemus's action as signaling "as the left front tire crossed the lane line." Officer [1] elaborated by stating the left front of Mr. Lemus's vehicle was "across the lane line." Officer [1] stated his belief that Mr. Lemus had committed "the traffic infraction of failing to signal properly prior to changing a lane." This testimony is sufficient to persuade a fair-minded person that Mr. Lemus crossed the lane line before he signaled.
>
> Conclusion of Law 2 states: "The initial traffic stop for failing to signal intent to change lanes was valid." RCW 46.61.305 partly states:
>
> > (1) No person shall turn a vehicle or move right or left upon a roadway unless and until such movement can be made with reasonable safety nor without giving an appropriate signal in the manner hereinafter provided.
> > (2) A signal of intention to move or move right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning.
>
> Paraphrased in the affirmative, RCW 46.61.305(1) plainly means that the driver must make a lane change safely and with an appropriate signal. RCW 46.61.305(2) clearly requires a signal for at least 100 feet before the lane change. Given the findings, and the clear meaning of RCW 46.61.305, we conclude Officer [1] had probable cause to believe Mr. Lemus had committed an infraction. Accordingly, Conclusion of Law 2 is correct; the initial traffic stop was valid.

[Citations, officer's name omitted]

(2) Extending the traffic stop to investigate other matters

The Lemus Court explains as follows that the officers were justified in extending the duration of the traffic stop to investigate possible driving under the influence:

> A stop for a traffic infraction can be extended solely when an officer has articulable facts from which the officer "could reasonably suspect criminal activity." And the continued detention must be "limited to the length of time needed to investigate the increasingly suspicious circumstances."
>
> Here, Officer [2] sighted the suspected cocaine as Mr. Lemus reached up to sign the NOI. Officer [1] also detected the odor of intoxicants at around the same time. Significantly, Mr. Lemus does not challenge the validity of the pat-down search, which further extended the initial seizure. These facts would lead a reasonable person to suspect Mr. Lemus had committed at least an alcohol offense and thus provided an independent basis for extending the initial seizure.
>
> Mr. Lemus also contends briefly that his removal from the vehicle in order to conduct the FSTs was a mere pretext to allow time for the automobile search. As he cites no authorities to support this proposition, this court need not consider the matter. In any

> event, there is nothing in the record to suggest the FSTs were conducted for any reason other than a legitimate suspicion that Mr. Lemus was under the influence of alcohol.
>
> In sum, we conclude the extended seizure of Mr. Lemus was reasonable.

[Citations, officer's name omitted]

(3) "Open view" of suspicious powder and warrantless entry of the car to seize and test it

The Lemus Court explains the difference between "open view" and "plain view" rules. "Open view," while lawful, is made from outside a protected private area, and an officer making an "open view" observation requires additional justification (an exception to the search warrant requirement) to enter the private area, while "plain view" assumes the officer is already lawfully present in the protected private area. The Court explains that the officers here made only "open view" observations from outside the car, and therefore were not justified in seizing the powder and testing it:

> Here, the State contends the warrantless search and seizure fell under the "plain, or open view exception" to the warrant requirement. The "plain view" doctrine applies after the officer intrudes into an area or activity where a reasonable expectation of privacy exists. If the officer has made a justifiable intrusion and sights contraband, he can seize the evidence without a warrant. But, the plain view doctrine justifies a seizure solely where the officer has legal "access" to the seized contraband.
>
> By contrast, the "open view" doctrine applies when an officer observes contraband from a "nonconstitutionally protected area." The "open view" observation is thus not a search at all but may provide evidence supporting probable cause to constitutionally search; in other words, a search pursuant to a warrant.
>
> Here, Officers [1] and [2] stood outside the automobile parked on a city street and conducted a valid, routine traffic stop. Mr. Lemus does not have any expectation of privacy on a city street. In other words, Mr. Lemus cannot claim constitutional privacy protection in the places where these officers stood. Further, Officer [2]'s use of a flashlight, as a routine officer safety measure, did not turn the observation into "an intrusive method of viewing."
>
> An officer's act of observing the interior of an automobile through its windows while the vehicle is parked in a public place is not a search "in the constitutional sense." Simply put, the "plain view" doctrine does not apply if the contraband can be viewed from outside the vehicle. Accordingly, the observation of the powdery substance on Mr. Lemus's pant leg was not a search; it was an "open view" observation of "that which was there to be seen."
>
> Consequently, the trial court erred in concluding that Officer [2]'s observations justified "a plain-view search of Mr. Lemus' person and the front seat of the vehicle."

[Citations, officers' names omitted]

(4) Search incident to arrest

Finally, the Lemus Court turns to the only search warrant exception -- search incident to arrest -- that might arguably justify the officers' entry of Lemus's car to seize the suspicious white powder. The Court concludes as follows that this exception does not apply because, in the Court's view, the officers developed probable cause to arrest Lemus only after they tested the powder:

> Consistently, a search incident to a custodial arrest may precede the formal arrest, so long as the search and arrest are closely related in time and place and the searching officer has probable cause to arrest before the search begins. "The arrest need not precede the search, but it must be contemporaneous with the search."

> Assuming the search and arrest were closely related in time and place, the critical question is whether Officer [1] had probable cause to arrest Mr. Lemus prior to the search. Importantly, the trial court did not conclude, and the State does not argue, that Officer [1] had probable cause to arrest Mr. Lemus prior to the search.
>
> In any event, it is an unchallenged finding that the officers believed that testing was the "only reliable" method of identifying cocaine. And other unchallenged findings show that Officer [1] did not arrest Mr. Lemus until after the sample recovered from the car tested positive for cocaine. Consequently, it appears probable cause for the arrest was based solely on the fruits of the search.
>
> Because the State does not argue any other exception to the warrant rule applies, we decide the trial court erred in concluding the seizure was a permissible search incident to arrest. Consequently, the search of the car was unconstitutional under article I, section 7.

[Citations omitted; officers' names deleted]

LED EDITORIAL COMMENTS:

(1) Do officers need probable cause to justify non-consensual entry of an occupied vehicle to investigate suspicious circumstances? We believe that the both the federal, Fourth Amendment and the Washington constitution, article 1, section 7, require that officers have probable cause as to commission of a crime to justify entry of an occupied vehicle for investigative purposes. While the rationales of officer-safety or "community caretaking" might justify vehicle entry on facts not rising to probable cause, we think that the Lemus Court was correct to the extent that the Court concluded that the officers needed probable cause to enter Lemus's vehicle to seize the cocaine for testing. At the risk of oversimplifying, but in hopes of under-digressing, we would note that, under the Fourth Amendment, the lawfulness of entry might be based on the "Carroll doctrine" (the federal "probable cause car search" doctrine which the Washington Supreme Court rejected in an "independent grounds" ruling in State v. Ringer, 100 Wn.2d 686 (1983)), while, under Washington's article 1, section 7, the lawfulness of entry of the vehicle to investigate the suspicious powder could be justified only under the rules for "search incident to arrest."

(2) Did the officers have probable cause to believe the powder was cocaine? We think that the Court of Appeals may have been wrong on this question. The officers may have had probable cause to believe the white powder they were observing on Lemus' pants leg was cocaine (and that would have justified immediate entry of the vehicle to seize the cocaine, even if the officers had first seized the cocaine and then made the formal arrest of Lemus). PC likely was present, in our view, because the officers were aware: (i) that Lemus was a drug dealer; (ii) that Lemus was unusually nervous; and (iii) that Lemus was trying to prevent the officers from observing the white powder. See the discussion in LaFave, Search and Seizure (1996) section 3.6(b) (addressing probable cause as to possible controlled substances based on first-hand information of the police – for instance, where an experienced and trained officer spots a residue-lined, small-bowled pipe during a traffic stop).

The Lemus Court seemed strongly influenced on the PC question by that Court's belief that the officers and the prosecutor apparently conceded that the officers could not be certain, and hence did not have probable cause, as to the nature of the substance until the officers tested it. The test for PC is not set at such a high level (i.e., certainty), and the subjective beliefs of officers and prosecutors as to the definition of probable cause are not determinative for the courts as to whether there is PC. But such subjective beliefs do tend to influence the courts. We think this case might have had a different outcome had the officers testified (as we believe reasonable and honest officers could testify under these facts) that they believed they had probable cause that the substance was cocaine, but that they had to test the powder to confirm their strong suspicions.

(3) What if the officers had been lawfully inside the vehicle when they seized the cocaine—would the testing of the cocaine been deemed an unlawful warrantless search? The Lemus Court does not discuss what the officers' authority would have been in a plain view situation, i.e., if the officers had seized the powder while lawfully inside the interior of the car. While generally police may not seize an item and carefully inspect it in order to develop probable cause for a plain view seizure (see Arizona v. Hicks, 480 U.S. 321 (1987)), a chemical test of suspicious powder to determine if it is cocaine is not considered a "search" of the item, so the officers would have been justified in their actions had they lawfully been inside the car at the time of seizure and testing of the powder. See U.S. v. Jacobsen, 466 U.S. 109 (1984) (where the U.S. Supreme Court held that a chemical test which will reveal only if a substance in plain view is contraband does not implicate privacy interests).

STATE CONCEDES ISSUE OF "EXIGENT CIRCUMSTANCES" FOR WARRANTLESS RESIDENTIAL-ENTRY; AND STATE LOSES ON ISSUE OF "ATTENUATION" RE OFFICER'S POST-ARREST ID; BUT CONVICTION UPHELD ON "HARMLESS ERROR" ANALYSIS

State v. Le, ___ Wn. App. ___, 12 P.3d 653 (Div. I, 2000)

Facts and Proceedings Below: (Excerpted from Court of Appeals decision)

> Police officer [1] responded to a burglary in progress call placed by a man who saw two young Asian males jump over his neighbors' fence. Officer [1] and other officers set up a perimeter around the home and announced their presence. Officer [1] saw an Asian male fleeing the residence. She gave chase until she lost him, then returned to the house.
>
> At that point, a second Asian male stepped out of the front door of the house. Officer [1] ordered the suspect to stop, and he turned and looked directly at her for approximately ten seconds before running away. She gave chase until she lost sight of him, then broadcast a description of the suspect. A K-9 officer was called in to assist with the search. Meanwhile, the homeowner told police that he believed a firearm was missing from his home.
>
> Officer [2] and his tracking dog arrived on the scene and searched the area. Ninety minutes into the search, the officer saw a nearby residence with the front door open. Officer [2] and the tracking dog searched the house but did not find anyone there. Unable to locate a suspect, they terminated the search and left the scene.
>
> Approximately 15 minutes later, a local resident called 911 and indicated that a "young man" had just run through his yard and into the house that had just been searched by Officer [2]. No further description of the suspect was given. Police returned to the house and found the front door closed and locked. One of the officers saw someone inside running toward the rear of the residence. Although he lacked a search warrant, Officer [2] and his tracking dog entered the home through an unlocked window and searched the house. Officer [2] noticed a number of locked doors in the basement of the residence. Unable to determine whether the house was empty, Officer [2] waited until a superior officer arrived. Still lacking a warrant, the superior officer gave permission to break into the locked rooms. As Officer [2] kicked in one door, he heard a voice coming from another room and ordered the occupant to come out. The suspect exited the room and was immediately arrested. That person was defendant Tan Le, who resided at the home where the arrest took place.
>
> Officer [1] was called to the scene, where she identified Le as the second person she had chased from the burglarized residence approximately three hours earlier. She indicated that Le was not wearing the same clothing that he wore when she saw him fleeing the scene of the crime, but she was certain that he was the same person. Officers seized some clothing from the residence during the search.

> Le was charged with residential burglary and theft of a firearm. At a CrR 3.6 hearing prior to trial, Le moved to suppress all physical evidence seized from his residence as fruits of an illegal search. In addition, Le moved to suppress Officer [1]'s identification of him as the fruit of an illegal arrest. The trial court granted Le's motion to suppress physical evidence, finding that the warrantless search of Le's home was illegal and that the "hot pursuit" and "exigent circumstances" exceptions were inapplicable. However, the court refused to suppress Officer [1]'s postarrest identification of Le as fruit of the poisonous tree, concluding that the arrest was properly supported by probable cause and the officer had an independent basis for her identification. The trial court later permitted Officer [1] to identify Le in court. The jury acquitted Le of theft of a firearm, but found him guilty of residential burglary.

[Officers' names omitted]

ISSUES AND RULINGS: (1) Was the State correct in conceding that exigent circumstances did not justify the warrantless entry of Le's residence to arrest him? (ANSWER: Yes); Was the officer's post-arrest identification of Le tainted by the unlawful entry of Le's residence? (ANSWER: Yes); (3) Is the non-tainted evidence of Le's guilt so overwhelming as to make the trial court's error in admitting the officer's testimony as to the post-arrest ID "harmless error?" (ANSWER: Yes)

Result: Affirmance of King County Superior Court conviction of Tan Le for residential burglary.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) Exigent circumstances

> A police officer may make a warrantless felony arrest in a public place if supported by probable cause. However, in the absence of exigent circumstances, the Fourth Amendment to the United States Constitution prohibits police from making a warrantless, nonconsensual entry into a suspect's home in order to make a routine felony arrest. This is true even where the arrest is supported by probable cause.
>
> Exigent circumstances justifying warrantless police entry into a home to carry out an arrest may be found where: (1) a grave offense, particularly a violent crime, is involved; (2) the suspect is reasonably believed to be armed; (3) there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) the suspect is likely to escape if not apprehended; and (6) the entry is made peaceably. Five additional examples of exigent circumstances include: (7) hot pursuit; (8) fleeing suspect; (9) danger to arresting officer or to the public; (10) mobility of the vehicle; and (11) mobility or destruction of the evidence.
>
> Here, the trial court analyzed all of these factors and concluded that the warrantless search of Le's home violated his federal and state constitutional rights. Specifically, the court concluded that the exigent circumstances exception was inapplicable to the case, and that there was no "hot pursuit" because the pursuit had ended well before Le was seized. The court nevertheless held that the arrest of Le was proper because it was supported by probable cause. This ruling was plainly incorrect. In the absence of consent or exigent circumstances, the police were constitutionally prohibited from making a warrantless entry into Le's home to make a felony arrest, even if probable cause existed to arrest him. The State does not assign error to the trial court's findings that the exigent circumstances and hot pursuit exceptions to the warrant requirement did not apply to this case. We hold that Le was illegally arrested.

(2) Post-arrest ID testimony

Relying heavily on United States v. Crews, 445 U.S. 463 (1980) the State urges this court to apply the independent source doctrine to validate both the postarrest and in-court identifications of Le. In Crews, the police seized a robbery suspect on pretextual reasons, photographed him at police headquarters, and released him. The photographs were shown to the robbery victims, who identified the suspect as the robber. The defendant was then taken into custody, where the victims identified him at a court-ordered lineup. The trial court ruled that the initial seizure was an illegal arrest, and accordingly suppressed the photographic and lineup identifications, but permitted the victims to identify the defendant in court. The circuit Court of Appeals reversed, holding that one of the robbery victim's in-court identification should have been suppressed as fruit of the unlawful police activity.

The United States Supreme Court reversed and reinstated the conviction, reasoning that a victim's in-court identification has three distinct elements: (1) the victim is present at trial; (2) the victim possesses the knowledge of and the ability to reconstruct the prior criminal occurrence and to identify the defendant from observations at the time of the crime; and (3) the defendant is physically present. The Court concluded that none of these elements had been obtained by exploitation of the defendant's Fourth Amendment rights. First, the victim's identity and cooperation were obtained prior to the illegal police activity. Second, the illegal arrest did not infect the victim's ability to give accurate identification testimony based upon her observations at the time of the robbery:

> Based upon her observations at the time of the robbery, the victim constructed a mental image of her assailant. At trial, she retrieved this mnemonic representation, compared it to the figure of the defendant, and positively identified him as the robber. No part of this process was affected by respondent's illegal arrest.

The Court acknowledged that under some circumstances, the intervening photographic and lineup identifications could affect the reliability of the in-court identification and render it inadmissible, but under the facts of that case the trial court found that the victim's in-court identification of the defendant rested on an independent recollection of her initial encounter. In support of this conclusion, the Court noted that the victim viewed the assailant at close range under well-lit conditions and with no distractions for five to ten minutes; that he closely matched her description of him; that she immediately identified him in pretrial identification procedures; and that she first identified him only a week after the initial encounter.

Third, the defendant's presence at trial was not obtained by exploitation of his rights because an illegal arrest, without more, is not a bar to prosecution. Thus, "[r]espondent is not himself a suppressible 'fruit,' and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct."

Clearly, Crews provides the correct analytical framework where the pretrial identification was inadmissible and the issue is whether the in-court identification must also be excluded. But the Crews analysis did not address the admissibility of pretrial identifications, because in Crews the United States Supreme Court simply accepted the trial court's finding that the pretrial photographic and lineup identifications were properly suppressed. Here, in contrast, Le challenges the postarrest identification.

[The Crews] Court was concerned with the reliability of the witness's in-court identification, which might have been tainted by the excluded pretrial identifications were it not for the independent source of her recollections. The independent source of information served to show that the in-court identification was not affected by the

excluded pretrial identifications. In contrast, where the pretrial identification is being challenged, the taint arises directly from the illegal arrest. This taint is not purged by the "independent source" of information. To so hold would eviscerate the very purpose of the exclusionary rule by excusing the illegality of the arrest and accepting the assertion that the victim's recollection of the defendant at the scene of the crime was an "independent source."

We conclude that the postarrest identification of Le was not attenuated from the primary illegality. Because the independent source analysis of Crews applies to in-court identifications but not to pretrial identifications, there are no applicable exceptions to the exclusionary rule. The testimony of Officer [1] regarding her postarrest identification of Le was fruit of the poisonous tree, and should have been excluded. And, although counsel for Le indicated at oral argument that Le no longer challenges the admissibility of the in-court identification, we note in passing that it was admissible under Crews.

(3) Harmless error

A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result, despite the error. We examine the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt.

After excluding Officer [1]'s inadmissible postarrest identification testimony, we conclude that the remaining evidence meets this constitutional harmless error standard. Officer [1] testified that she got a very good look at Le before he fled the scene of the burglary. Officer [1] observed Le from a short distance in broad daylight for approximately ten seconds before he ran away. She then readily identified him in court approximately six months later. Furthermore, one of Le's neighbors testified that he called 911 when he saw a "young man" running through his yard and into the house Officer [2] had recently searched. The house turned out to be Le's house, and the sole person apprehended there was Le. This evidence is sufficiently overwhelming to lead to a finding of guilt. Thus, we affirm the conviction despite the error.

[Some citations and footnotes omitted; officers' names omitted]

LED EDITORIAL COMMENT: When a party concedes a legal issue, the appellate court must still look at the issue to decide whether the law is consistent with the concession. Though human nature is such that courts probably do not consider such conceded issues with the same care as they do contested issues, we think it is a close question whether the Court of Appeals should have accepted the State's concession on the "exigent circumstances" issue. But, in light of the difficulty the prosecutor would have had in distinguishing this case from State v. Counts, 99 Wn.2d 54 (1983), we think that the State probably made a reasonable tactical decision in deciding not to contest that issue.

The two leading Washington decisions on what constitutes "exigent circumstances" justifying warrantless, forcible entry of a residence to arrest are: State v. Counts and State v. Terrovona, 105 Wn.2d 632 (1986). Based on our reading of those decisions, as well as other Washington decisions and decisions of the United States Supreme Court, we think that the rule for non-consenting, warrantless entry to arrest requires that officers: (1) be in immediate, virtually unbroken, "hot pursuit" of a fleeing felon; or (2) have "exigent circumstances."

The test of whether there are "exigent circumstances" justifying forcible entry to make an arrest takes into account the following non-exclusive factors, no one of which is necessarily determinative: (1) the seriousness and violence of the crime involved; (2) whether the suspect is believed to be armed; (3) the strength of the probable cause; (4) the strength of the reason to believe the person is presently on the premises; (5) the likelihood of escape, destruction of

evidence or danger to the officers or others if officers wait to secure a warrant (the courts thus take into account the speed with which a search warrant can be obtained); (6) the time elapsed since the crime was committed or since officers were last in "hot pursuit" of the suspect. These factors, articulated by courts in varying forms, are often referred to as the "Dorman factors," based on the totality-of-the-circumstances test set forth in a Federal court case of that name.

In Le, though a felony was suspected and likely would have justified "hot pursuit" into Le's residence, there was no "hot pursuit," as the officer's had lost contact with Le for at least 15 minutes when a citizen saw a person run into the home in question. So the issue was whether there were "exigent circumstances" under the Dorman factors.

The Counts case involved three unrelated cases, consolidated for appeal. We will discuss two of those cases. In one of those two cases, within an hour of responding to a burglary at a golf course, officers had gotten a confession from one of two suspected accomplices, and officers had used a dog to track the other suspect to his home. The officers knocked, and the suspect's father answered the door. The father refused consent to enter. After an almost hour-long discussion with the father, the officers forced entry and arrested the son. With very little analysis of the "exigent circumstances" factors, the Counts Court held that the officers lacked exigent circumstances to justify the forced, warrantless entry.

In the second of the consolidated Counts cases, police received a kidnapping-and-rape report from a victim who told them that she had just left the house to which she had been taken and raped. The victim was first taken to the hospital, but when the officers could not find the house per her description, the officers retrieved her, and she guided them to the house. A few hours had passed at that point. The officers knocked and announced, but when no one responded in the next few minutes, the officers went inside the house through an unlocked door. The officers found one of the two suspects in a back bedroom. The Washington Supreme Court rejected the State's "exigent circumstances" argument under the following analysis:

> **In arguing the existence of exigent circumstances, the State emphasizes the considerable time it would have taken to obtain a warrant in the likelihood that the evidence would not have remained undisturbed unless seized in the early morning hours. If the police reasonably fear destruction of evidence, a warrantless entry will be upheld. There is no indication in this case, however, that the police had any cause to believe that the destruction of evidence was imminent. Again, the police could have maintained surveillance while obtaining the requisite warrant. As the United States Court of Appeals stated in United States v. Bulman, 667 F.2d 1374, 1384 (11th Cir. 1982):**
>
> > **The exigent circumstances doctrine is applicable only within the narrow range of circumstances that present a real danger to the police or the public or a real danger that evidence . . . might be lost.**

In the Terrovona case, during a four-hour period following the 8 p.m. discovery of the victim's body alongside the roadway, officers developed strong probable cause to believe that Terrovona had shot and murdered his stepfather. Officers went to Terrovona's home at midnight. The officers knocked and announced at the front door. As soon as Terrovona opened the door, the officers stepped inside and placed him under arrest. The Terrovona Court upheld this forcible, warrantless entry under the following analysis:

> **In State v. McIntyre, 39 Wn. App. 1 (1984), the Washington Court of Appeals found all of the Dorman elements satisfied. There, after a police officer had stopped McIntyre for a traffic violation, McIntyre fought with the officer, took his gun and threatened to kill him. The police traced McIntyre to his house and**

there arrested him without a warrant. Citing Counts, the Court of Appeals held that the danger McIntyre presented demonstrated exigent circumstances justifying a warrantless search and seizure.

The police did not seek a warrant in this case but directly moved in and arrested the defendant. We conclude that the exigent circumstances which existed in this case justified the defendant's warrantless nighttime arrest in his apartment. The trial court observed that: the decedent's wallet with more than $100 in it was found on his body; he had been drawn to the scene and killed; it appeared to be a premeditated, not haphazard, homicide; there was a need to protect the public; and there was the distinct possibility of the defendant fleeing. All of the Dorman factors were present. We agree with the trial court's conclusion that exigent circumstances justifying entrance into the defendant's apartment existed and that the warrantless arrest was valid.

It is debatable whether the Counts and Terrovona opinions are consistent with each other. They certainly don't give officers a "bright line" test. Since the test for "exigent circumstances" is not a "bright line" test, it is difficult to give a rule of thumb in this area. We didn't think the Counts opinion made great sense (or was necessarily required under Fourth Amendment rulings from other jurisdictions) when it was decided in 1983, and we still harbor those doubts about Counts.

But, in light of the fact that no Washington decision in the near-two-decade-interim has questioned the strength of Counts, we must fall back to our old standby: when in doubt, get a search warrant or consent to enter.

K-12 STUDENT'S VIOLATION OF HIS SCHOOL'S CLOSED-CAMPUS RULE DID NOT JUSTIFY A SEARCH OF THE STUDENT BY A SCHOOL OFFICIAL

State v. B.A.S., ___ Wn. App. ___, 13 P.3d 244 (Div. I, 2000)

Facts and Proceedings Below: (Excerpted from Court of Appeals opinion)

> B.A.S. attends Auburn Riverside High School, which has a closed campus policy. This policy prohibits students from leaving campus during school hours without permission from the school. The school's parking lot is considered off campus, and the school has a policy that any student seen in the parking lot without permission or a valid excuse is subject to search. The purpose of the policy is to promote safety by ensuring that students do not bring prohibited items, such as drugs and weapons, onto school grounds.
>
> On November 25, 1998, Auburn Riverside's school attendance officer [the SAO], saw B.A.S. and three other boys about 20 feet from the parking lot. [The SAO] knew that B.A.S., who was only 15 years old at the time, did not have a car and did not have permission to be in the parking lot. According to [the SAO], as he approached the group he noticed that B.A.S.'s pants had a one- to two- inch wet ring around the bottom, which suggested to [the SAO] that B.A.S. had been in a nearby field because the campus area was dry and it had not been raining. He also noticed that B.A.S. and his companions looked surprised to see him. Based on B.A.S.'s proximity to the parking lot, his wet pant legs, and his startled response when he saw [the SAO], he concluded that B.A.S. had been off campus.
>
> [The SAO] asked the four boys to go to his office so he could talk to them individually. Before talking to B.A.S., [the SAO] checked the school's attendance records and learned that B.A.S. was missing class. He then invoked the school's search policy and asked B.A.S. to empty his pockets to ensure that he had not brought any prohibited items onto the school's campus. B.A.S. initially refused, but complied after [the SAO] threatened to call his father. When B.A.S. pulled a black

case out of his pocket and put it on the table, [the SAO] opened the case and found several plastic baggies filled with a substance he suspected was marijuana. Later testing confirmed that [the SAO]'s suspicion was correct.

After B.A.S. was charged, the court held a CrR 3.6 hearing during which B.A.S. moved to suppress the evidence from the search. *[COURT'S FOOTNOTE: A school official's demand that a student empty his or her pockets constitutes a search. See, e.g., State v. Slattery, 56 Wn. App. 820 (1990)]*. The commissioner denied the motion and in a bench trial found B.A.S. guilty as charged.

ISSUE AND RULING: Under the relaxed rules governing searches by (non-police) K-12 school authorities, was the attendance officer justified in searching B.A.S. based on the attendance officer's reasonable grounds to believe that B.A.S. had violated the school's closed-campus rule: (ANSWER: No, because there was no evidentiary connection between the violation and the search)

Result: Reversal of King County Superior Court juvenile court conviction of B.A.S. for possession of less than 40 grams of marijuana.

ANALYSIS: (Excerpted from Court of Appeals opinion)

We hold that [the SAO]'s suspicion that B.A.S. had violated the closed campus rule did not provide reasonable grounds for concluding that a search would reveal evidence of that or additional violations of law or school rules. The search was therefore illegal, and we reverse B.A.S.'s conviction.

The Fourth Amendment to the U.S. Constitution and the Washington Constitution, article I, section 7, protect people from unreasonable searches and seizures and invasions of privacy. *[COURT'S FOOTNOTE IN PART: The Washington Constitution does not provide students with greater protections from searches by school officials than the Fourth Amendment.]* In New Jersey v. T.L.O., 469 U.S. 325 (1985) the United States Supreme Court held that school authorities may conduct a warrantless search of a student without probable cause if the search is reasonable under all the circumstances. A search is reasonable if it is: (1) justified at its inception; and (2) reasonably related in scope to the circumstances that justified the interference in the first place. A search is justified at its inception only when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Washington courts have established the following factors as relevant in determining whether school officials had reasonable grounds for a search:

> the child's age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search.

[The SAO]'s search of B.A.S. does not pass muster under these standards.

[The SAO] searched B.A.S. for contraband because he believed B.A.S. had violated the school's closed campus policy and because Auburn Riverside has a policy "that all students seen in the parking lot area without permission are subject to search." But these grounds did not provide a reasonable basis for suspecting that a search would either confirm [the SAO]'s suspicion or reveal that B.A.S. committed some other offense. There must be a nexus between the item sought and the infraction under investigation. Here there was no evidence in the record of a correlation between a student's violation of the closed campus policy and a likelihood he or she

is bringing contraband onto campus. Thus, the required nexus is absent, and we reject the State's blanket supposition that "[b]y violating school rules, a student necessarily draws individualized suspicion on himself." Auburn Riverside understandably has in place a system of punishment for students who go into the parking lot without permission, but violating that rule without more does not warrant an automatic search.

Nor does the general purpose of the search policy, without more, provide a reasonable basis for searching B.A.S. The commissioner found that the policy's purpose is "to ensure the safety of students at school and to ensure that prohibited items are not brought onto the school grounds. Prohibited items include marijuana, drugs, and weapons, among other items." [The SAO] testified that the goal of searching students who go into the parking lot during school hours is "safety." When asked the school's specific safety concerns, [the SAO] answered: "Well, the big ones that have been happening lately, the Columbine issue, the [INAUDIBLE] and just make it a safe place for the students and the staff." The State asked [the SAO] to elaborate, and he responded: "Well, there's always the issues [sic] of drugs, you know, that's something, that, of course, is illegal in the state of Washington and we want to enforce that." Recent events certainly justify these important concerns, but alone they cannot provide a reasonable basis for searching any student suspected of going off campus. There must be some nexus between that violation and the official's belief that a search may turn up evidence the student violated the closed campus rule, other school rules or the law.

An analysis of the remaining reasonableness factors lends further support to our conclusion that this search was not justified. While [the SAO] stated he knew B.A.S. was only 15 and did not drive to school, that information is not relevant to any reasonable ground for searching him; rather, it only supported [the SAO]'s belief that B.A.S. did not have a valid excuse for being in the parking lot. There is no indication that B.A.S. habitually broke the law or school rules, or that he or his friends had ever brought contraband onto the school's campus. The record is also silent on whether B.A.S. had either academic or behavioral difficulties in school. In short, there was nothing about B.A.S.'s age, history or school record that justified the search. Finally, there were no exigent circumstances present here. In sum, there was no basis articulated in the record for suspecting B.A.S. was carrying proscribed items, and the search was therefore unreasonable. *[COURT'S FOOTNOTE: We reject the State's contention that B.A.S. consented to the search. He did not consent. Rather, he followed the directive of a school official that he submit to a search.]*

In State v. Brooks, 43 Wn. App. 560 (1986) a post-T.L.O. school search case, we affirmed the conviction where the vice principal believed Brooks was often under the influence of drugs based on her interactions with him and similar reports from three of Brooks' teachers; the vice principal had received information from a student who had a locker near Brooks' that he was selling marijuana out of a blue metal box in another, unassigned locker; and Brooks was known to frequent a location near the school where drug trafficking commonly occurred. The substantial grounds for suspicion in Brooks are in stark contrast to the virtual absence of any reasonable grounds for suspecting that B.A.S. had committed a violation. *[COURT'S FOOTNOTE: See also Slattery, 56 Wn. App. 820, 787 P.2d 932 {Div. I, 1990) (Slattery conceded that a search of his person was reasonable where a reliable informant told the principal that Slattery was selling marijuana in the parking lot and the principal had received other reports that Slattery was involved with drugs); State v. Sweeney, 56 Wn. App. 42, 782 P.2d 562 (1989) (ordering Sweeney to empty his pockets and search were reasonable where a student leader in Sweeney's dormitory informed the dormitory supervisor that Sweeney was selling drugs, and the*

supervisor already suspected Sweeney of drug involvement because other students came and went from Sweeney's room at unusual hours.)]

[Some footnotes and citations omitted]

LED EDITORIAL NOTE: For an overview of "school search" law, see the article, "School Search Reference Guide," a joint publication of the Offices of the Washington Superintendent of Public Instruction and of the Washington Attorney General. The overview may be accessed on the Internet at [http://www.wa.gov/ago/ourschool/2_search/Title.htm].

ESCAPEE FROM INSTITUTION HAD NO REASONABLE PRIVACY EXPECTATION AGAINST SEARCH OF RESIDENCE WHERE FRIEND'S FRIEND WAS ALLOWING HIM TO RESIDE

State v. Thang, ___ Wn. App. ___, 13 P.3d 1098 (Div. III, 2000)

Facts and Proceedings:

Vy Thang escaped from a state juvenile institution along with Simeon Terry. The two of them moved in with Terry's friend, Jess Dietzen.

Police investigation of a brutal, stomping murder of an 85-year-old woman focused on Thang as a suspect. Officers went to Dietzen's apartment. Dietzen gave the officers oral consent to go inside and arrest the two fugitives. After the arrests, Dietzen gave the officers written consent to search the common areas of the apartment, where officers found some evidence incriminating Thang (including bloody shoes).

Thang was tried and convicted of aggravated fist degree murder.

ISSUE AND RULING: Did Thang, as an institutional escapee, have any expectation of privacy in the place where he was being allowed to reside? (ANSWER: No)

Result: Affirmance of Vy Thang's Spokane County Superior Court conviction of aggravated first degree murder.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The issue is whether the trial court erred when denying Mr. Thang's motion to suppress the evidence collected at Mr. Dietzen's apartment and concluding Mr. Thang, as an escapee, had no legitimate expectation of privacy while hiding in his host's premises.
>
> Mr. Thang, pro se, alleges a violation of both the federal and state constitutions. His state constitutional argument is not supported by the required Gunwall analysis. State v. Gunwall, 106 Wn.2d 54 (1986). In any event, to prevail, Mr. Thang must demonstrate he had a legitimate expectation of privacy; an expectation society was prepared to recognize. See United States v. Jacobsen, 466 U.S. 109 (1984) (comparing concept of interest in privacy, society prepared to recognize with mere expectation that certain facts will not come to attention of authorities). The test as to whether a legitimate expectation of privacy exists is whether (1) the person subject to search "exhibited an actual (subjective) expectation of privacy[,]" and (2) whether that expectation was one "society is prepared to recognize as 'reasonable.' "
>
> It appears no Washington court has considered whether an escapee has a legitimate expectation of privacy while hiding from authorities, but a number of courts in other jurisdictions have concluded they do not.
>
> Generally, a person whose presence at the searched premises is "wrongful" does not have a "legitimate" privacy expectation; society is not prepared to recognize such an

expectation as "reasonable." In this connection, an escapee is "no more than a trespasser on society." United States v. Roy, 734 F.2d 108, 111 (2nd Cir. 1984) (citing State v. Hiott, 276 S.C. 72, 77, 276 S.E.2d 163 (1981)). An escapee abandons his sole legitimate place of residence and is therefore wrongfully on the premises in which he hides. Hiott, 276 S.E.2d at 165-66. "[A]n escapee [is] in constructive custody for the purpose of determining his legitimate expectations of privacy; he should have the same privacy expectations in property in his possession inside and outside the prison." Roy, 734 F.2d at 111 (citing Robinson v.. State, 312 So.2d 15, 18 (Miss. 1975)).

These authorities are persuasive; Mr. Thang enjoyed no more expectation of privacy in the apartment than he did inside the juvenile institution. Convicted prisoners in Washington " 'have no legitimate expectation of privacy and ... the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells....' "

Because Mr. Thang had no legal right to be anywhere other than his place of commitment, he has no standing to challenge the search on behalf of the apartment's lawful residents. See Benn, 134 Wn.2d at 909 (reasoning defendant did not have standing to challenge search of other prisoner's cell). Moreover, the trial court ruled, and the record clearly shows, that Mr. Thang's hosts gave the police consent to enter the apartment to apprehend the escapees and consent for the subsequent search.

Accordingly, we conclude the trial court did not err.

LED EDITORIAL COMMENT: In briefing, the prosecutor pointed out that there were several independent reasons why Thang's challenge to the consent entry and search failed. The Court of Appeals chose to resolve the case based primarily on just one of the flaws in Thang's argument, i.e.; his lack of any privacy interest due to his escapee status.

We have previously suggested in the LED, as to exceptions to the Exclusionary Rule (e.g. "inadvertent discovery"), and as to "standing" questions, that officers would be well-advised to not rely on these "technicalities." We think the same applies here. As the officers did in the Thang case, officers are well-advised to obtain consent to enter from the host, to get a search warrant where otherwise indicated, or even where the arrestee-guest is an escaped convict.

****

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) 1995 AMENDMENT TO PROFITEERING ACT (AND TO OTHER STATUTES) VIOLATED WASHINGTON CONSTITUTION'S "SUBJECT-IN-TITLE" AND "SINGLE SUBJECT" REQUIREMENTS; "OBSTRUCTING" LAWS APPARENTLY AFFECTED -- In State v. Thomas, ___ Wn. App. ___(Div. II, 2000) [2000 WL 1864047], the Court of Appeals rules that a 1995 act (chapter 285, Laws of 1995) extending the effect of Washington's Criminal Profiteering Act (CPA), violated the Washington constitution by: 1) failing to encompass the CPA-amendment in its title (which read: "An act relating to insurance fraud"); and 2) addressing more than one subject. The effect of the Thomas Court's ruling is that the Criminal Profiteering Act (including Trafficking in Stolen Property) was effectively repealed in 1995.

Result: Reversal of Clark County Superior Court conviction of Kiley Thomas under RCW 9A.82.060 for leading organized crime; affirmance of convictions on three counts of conspiracy to deliver controlled substances under RCW 69.50.407; remanded for sentencing without school bus stop enhancement.

LED EDITORIAL COMMENT: Other amendments under chapter, 285, Laws of 1995 modified chapter 9A.76. Section 32 of the 1995 act enacted RCW 9A.76.175, which reads:

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

Section 33 of the 1995 act amended RCW 9A.76.020 as follows:

(1) A person is guilty of obstructing a law enforcement officer if the person ((÷

~~**(a) Willfully makes a false or misleading statement to a law enforcement officer who has detained the person during the course of a lawful investigation or lawful arrest; or**~~

(b))) willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

(2) "Law enforcement officer" means any general authority, limited authority, or specially commissioned Washington peace officer or federal peace officer as those terms as defined in RCW 10.93.020, and other public officers who are responsible for enforcement of fire, building, zoning, and life and safety codes.

(3) Obstructing a law enforcement officer is a gross misdemeanor.

[Lineouts show text deleted in 1995]

Check with your prosecutor or other legal advisor as to how the Thomas decision affects enforcement and citation under RCW 9A.76.120 and 9A.76.175. It appears that the Thomas decision completely invalidates RCW 9A.76.175 and reinstates the language struck from RCW 9A.76.020 in 1995. The Thomas decision also appears to invalidate the following amendments under the 1995 act:

Section 26 -- amended RCW 2.48.180, unauthorized practice of law;
Section 27 -- amended RCW 9.12.010, the crime of bringing false suit;
Section 29 -- created the new crime of commercial bribery, which extends beyond the insurance arena;
Section 30 -- amended the definition of "oath authorized by law" in RCW 9A.72.010 to include oaths administered by persons authorized by state or federal law to do so.
Section 35 -- amended the crime of unprofessional conduct, RCW 18.130.190, causing a second offense to become a felony.

(2) POST-TRAFFIC-ARREST WARNINGS REQUIREMENT OF "IMPLIED CONSENT" STATUTE NOT TRIGGERED WHERE NO PC AS TO DUI; HENCE, CONSENTING BLOOD TEST ADMISSIBLE DESPITE OFFICERS' FAILURE TO GIVE IMPLIED CONSENT WARNINGS -- In State v. Avery, ___ Wn. App. ___, 13 P.3d 226 (Div. II, 2000), the Court of Appeals rules that, because arresting officers lacked probable cause to believe that a traffic arrestee was under the influence of alcohol or drugs, the officers were not required under the implied consent statute at RCW 46.20.308 to administer implied consent warnings in asking the arrestee to consent to a blood test.

Defendant Avery was arrested as the driver suspected of leaving the scene of a fatal car-pedestrian accident. The accident occurred around 6 a.m., and Avery was apprehended shortly afterwards. Avery was Mirandized and questioned by officers at the scene, and he was subsequently interviewed by several police investigators who were highly experienced in making the determination of whether drivers are under the influence. Though Avery had a slight smell of intoxicants and seemed tired, each of the investigating officers concluded that Avery was probably not under the influence of alcohol or drugs.

The officers nonetheless asked Avery if he would consent to a blood test to check for alcohol. The officers first re-Mirandized Avery, they orally advised him of his right to refuse consent, and they had him read and sign a written consent form. However, none of the advisements contained the "implied consent" warnings. Avery consented to a blood test. The test yielded a sample reading .17g/100 mL blood alcohol level.

Avery was charged and convicted of vehicular homicide, RCW 46.61.520, and failure to remain at the scene of an injury-accident, RCW 46.52.020(1). On appeal from the vehicular homicide conviction, Avery argued that the blood test results should be suppressed, because the officers had failed to give him the implied consent warnings. The Court of Appeals rejects Avery's argument, explaining as follows that the officers' absence of probable cause to believe that Avery was "under the influence" placed the circumstances outside the dictates of the implied consent statute:

> To trigger the implied consent statute, there must be both a valid arrest and reasonable grounds for the arresting officer to believe that the driver was driving under the influence at the time of the arrest. Thus, where the State has not yet arrested a driver, it need not give the driver the implied consent warnings and the driver may voluntarily consent to a blood or breath test. State v. Rivard, 131 Wn.2d 63 (1997) **April 97 LED:09**.
>
> [W]here the implied consent statute applies, the State cannot avoid complying with the [implied consent] statute by [merely] obtaining a driver's "voluntary" consent to a blood test.
>
> The statute states that any person who drives within the state is deemed to have given consent for a breath or blood test if arrested for "any offense" as long as the officer has reasonable grounds, at the time of the arrest, to believe the person was driving or in control of a vehicle while under the influence of intoxicants. RCW 46.20.308(1). A reasonable reading of the statute, which comports with the purpose of giving arrested drivers the opportunity to make knowing and intelligent decisions, is that the underlying offense may be any offense--alcohol or non-alcohol related.
>
> Therefore, the crime for which a driver is arrested does not control whether the implied consent statute applies. Although Avery was arrested for the failure to remain at an injury accident, a non-alcohol-related offense, the law required implied consent warnings if the officers had reasonable grounds to believe that Avery was driving under the influence at the time of his arrest.
>
> In Washington, "[p]robable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed." "The concept of probable cause requires the existence of reasonable grounds for suspicion supported by circumstances sufficiently strong to warrant a man of ordinary caution to believe the accused is guilty of the indicated crime." The definition of probable cause encompasses the reasonable grounds language. Thus, based solely on the language, the probable cause standard is appropriate. Further, in authorizing a breath or blood test, the statute is authorizing a search, which also dictates a probable cause standard. Unlike a Terry stop, where the officer only needs a reasonable suspicion of criminal activity, the taking of a breath or blood sample is more invasive than a "stop and frisk" search. For a so-called Terry or investigative stop, the officer only needs to have specific and articulable facts which lead to a reasonable suspicion of criminal activity. Thus, we conclude that the more stringent probable cause standard applies here.
>
> Applying this test, we ask whether, at the time of Avery's arrest, the facts and circumstances known to the arresting officers were sufficient to cause a reasonably prudent officer to believe that Avery had been driving under the influence. We examine those facts and circumstances "in the light of the arresting officer's special experience, and ... the standard should be, not what might appear to be [reasonable grounds] to a passerby, but what would be [reasonable grounds] to a reasonable, cautious, and prudent officer."
>
> In finding of fact 18, the trial court found that the arresting officers did not believe that Avery was under the influence. In finding of fact 29, the court found that two other officers, Skola and Strickland, were experts in the field of recognizing persons under the

> influence and that neither believed Avery was under the influence of intoxicants. The trial court also had the opportunity to judge the credibility of the four officers who interacted with Avery; this court will not disturb such credibility determinations on appeal.
>
> The court's other findings contain few indicia of possible intoxication. There was a faint odor of alcohol on Avery's breath; he seemed very tired, but this was explained by his work schedule. Avery's coordination was good, he was cooperative, his speech was good, and his eyes and face appeared normal. Although Skola's written report indicated a "slight impairment," this was contradicted by his other observations. And Sheehan, who thought that Avery might have been intoxicated, was neither the arresting officer nor the officer supervising the testing. Thus, his observations are not controlling.
>
> Overall, the evidence supports the unchallenged findings. These findings support a conclusion that at the time of the blood test neither the arresting officer nor the officers administering the test had reasonable grounds to believe Avery had been driving while under the influence. Thus, the implied consent statute did not apply.

[Some footnotes and citations, as well as substantial portions of the analysis deleted]

Result: Affirmance of Pierce County Superior Court convictions of Christopher Avery for vehicular homicide and failure to remain at the scene of an injury-accident.

LED EDITORIAL COMMENTS: There now appear to be two categorical exceptions to the general rule that officers must administer implied consent warnings before asking for consent to a breath or blood test from a driver suspected of driving under the influence. First, the implied consent warnings need not be given where no arrest has been made. See State v. Rivard, 131 Wn.2d 63 (1997). Second, the warnings need not be given where, as in the Avery case, the person has been lawfully arrested for a non-alcohol-related crime, and the officers lack probable cause to believe the person is under the influence.

Beware, however, of the pitfalls of relying on these exceptions. Both the question whether a person is "under arrest" and the question whether an officer "has probable cause" are highly fact-based. Thus, there is substantial risk that a suppression hearing judge will disagree with the officers' assessment of these matters.

As a final note, we would point out what some might say to be a third exception to the rule that implied consent warnings must be given prior to asking for consent to test a person's breath for alcohol content. Since the results of portable breath testing are not currently admissible in evidence for any purpose, (see State v. Smith, 130 Wn.2d 215 (1996)), there is no requirement that officers give "implied consent" warnings in asking for consent to do PBT testing in the field.

(3) ON TOTALITY OF CIRCUMSTANCES, STORE SECURITY PERSONNEL DID NOT VIOLATE "SHOPKEEPERS' PRIVILEGE" IN HOLDING SUSPECTED SHOPLIFTER UNTIL POLICE ARRIVED – In Guijosa, et. al. v. Wal-Mart Stores, Inc., 101 Wn. App. 777 (Div. II, 2000), the Court of Appeals rejects the argument of three civil litigants' that, as a matter of law, Wal-Mart security violated RCW 4.24.220 (the "shopkeeper's privilege statute") by holding them on probable cause for 20 to 30 minutes until police arrived to investigate.

The Guijosa case arose when Wal-Mart security personnel detained three men, Guijosa, Hernandez, and Delgado, on probable cause to believe the men had shoplifted. Upon seizure, Guijosa, who was the only one of the three who spoke English, told Wal-Mart security staff that the items belonged to them, and that they would make any further statement to the police when police arrived at the store. Police arrived 20 to 30 minutes later and took a statement.

Charges were filed against Delgado and Guijosa, but then, before the criminal trial, the charges were dismissed. All three men then sued Wal-Mart for false imprisonment, battery, malicious prosecution, and violation of the Consumer Protection Act. A jury returned a verdict for Wal-Mart.

On appeal, one of the issues was whether RCW 4.24.220 allows store security personnel, once they have completed questioning of suspects, to continue to hold suspected shoplifters on probable cause while waiting a reasonable period of time for police to respond to their call for assistance and investigation.

The Court of Appeals rejects the plaintiffs' hypertechnical reading of the language of RCW 4.24.220. The Guijosa Court holds that, so long as probable cause continues to exist throughout the detention, civilian store personnel may hold shoplifting suspects for a reasonable period of time to wait for police officers to arrive and further investigate. The evidence in this case supported the jury's finding that the Wal-Mart personnel continued to have probable cause throughout the detention, and that Wal-Mart personnel waited a reasonable period of time (20 to 30 minutes) for police to arrive, the Guijosa Court holds.

Result: Affirmance of Mason County Superior Court judgment on jury verdict for Wal-Mart.

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NEXT MONTH -- REVISITING STAATS V. BROWN

In the December 2000 LED at pages 21-22, we summarized the Washington Supreme Court decision in Staats v. Brown, 139 Wn.2d 757 (2000). **We may have erred** there in describing the current state of the law on authority of "fish and wildlife officers" (defined at RCW 77.08.010(5)) and of "ex officio fish and wildlife officers" (defined at RCW 77.08.010(6) to include city police officers and county deputy sheriffs) to cite or arrest for non-felony violations of Fish and Wildlife statutes and rules. In the December 2000 LED article on Staats, we said that F&W officers and ex officio F&W officers are not limited by the "in the presence" rule in enforcing such non-felony F&W statutes and rules, but may act on probable cause alone. Now, on further review of the multiple opinions issued in Staats, as well as the current language of RCW Title 77 and its history, we believe that the authority to cite or arrest for such F&W violations is probably limited by the "in the presence" rule. We will provide more analysis of this question in a short follow-up entry in the March **LED**.

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INTERNET ACCESS TO COURT DECISIONS, STATUTES, AND COURT RULES

The Washington office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http:www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be accessed through a separate link clearly designated.

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct]. This web site contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990.

A good source for easy access to relatively current Washington state agency administrative rules (including WSP equipment rules at Title 204 WAC) can be found at [http://slc.leg.wa.gov/WACBYTitle.htm]. Washington Legislation and other state government information can be accessed at [http://access.wa.gov]. Access to current Washington WAC rules, as well as RCW's current through 1999 can be accessed from the "Legislative Information" page at [http: www.leg.wa.gov/wsladm/ses.htm]. The text of acts adopted in the 2000 Washington legislature is available at the following address: [http://www.leg.wa.gov]. Look under "bill info," "house bill information/senate bill information," and use bill numbers to access information.

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments

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